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10/521,449	01/14/2005	Keith Douglas Perring	056222-5067	1532
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MORGAN LEWIS & BOCKIUS LLP 1111 PENNSYLVANIA AVENUE NW WASHINGTON, DC 20004			EXAMINER	
			DELCOTTO, GREGORY R	
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/521,449	Applicant(s) PERRING ET AL.
	Examiner Gregory R. Del Cotto	Art Unit 1796

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
 - If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
 - Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED. (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(o).

Status

- 1) Responsive to communication(s) filed on 05 March 2008.
- 2a) This action is FINAL. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1,2,4 and 11 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 1,2,4 and 11 is/are rejected.
- 7) Claim(s) _____ is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All b) Some * c) None of:
1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO-1668)
 Paper No(s)/Mail Date _____
- 4) Interview Summary (PTO-413)
 Paper No(s)/Mail Date _____
- 5) Notice of Informal Patent Application
- 6) Other: _____

DETAILED ACTION

1. Claims 1, 2, 4, and 11 are pending. Claims 3 and 5-10 have been canceled.

Applicant's amendments and arguments filed 3/5/08 have been entered.

Applicant's election of Group I, claims 1-4 in the reply filed on 3/5/08 is acknowledged. Because applicant did not distinctly and specifically point out the supposed errors in the restriction requirement, the election has been treated as an election without traverse (MPEP § 818.03(a)).

Claims 5-10 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on 3/5/08. Note that, non-elected claims 5-10 have been canceled.

Objections/Rejections Withdrawn

The following objections/rejections set forth in the Office action mailed 12/7/07 have been withdrawn:

The rejection of claims 1 and 4 under 35 U.S.C. 102(b) as being anticipated by WO 96/30470, WO99/18926, or Peterson et al (US 5,861,146) has been withdrawn.

The rejection of Claims 1 and 4 under 35 U.S.C. 102(e) as being anticipated by Perring et al (US 6,780,835) has been withdrawn.

The rejection of claims 1 and 4 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-11 of U.S. Patent No. 6,780,835 has been withdrawn due to the filing of a terminal disclaimer.

The rejection of claims 1-4 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 3-6 of copending Application No. 10/521432 has been withdrawn due to the filing of a terminal disclaimer.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

- (a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.
- (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.
- (e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.
- (e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) and the Intellectual Property and High Technology Technical Amendments Act of 2002 do not apply when the reference is a U.S. patent resulting directly or indirectly from an international application filed before November 29, 2000. Therefore, the prior art date of the reference is determined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 1, 2, 4, and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Peterson et al (US 5,861,146), WO99/18926, or Perring et al (US 6,780,835).

'926 teaches a perfume composition which gives good deposition and/or substantially improved deodorant effectiveness on textiles incorporating spandex fibres. The perfume comprises a mixture of fragrance materials in which at least 60% by weight of the composition comprises fragrance materials drawn from categories I and II. See Abstract. Suitable perfumes include dihydrolinalol, dihydromyrcenol, tetrahydrogeraniol, cis-jasmone, nonalactone gamma, etc., which are the same perfumes as recited by the instant claims. See page 17, lines 1-40.

Peterson et al teach methods of reducing body and/or vaginal odor comprising the application of a perfumed powder compositions comprising from about 0.1% to about 25% by weight of the composition, of uncomplexed cyclodextrin; a perfume composition selected from the group consisting of from about 0.05% to about 15%, by weight of the odor absorbing composition, of an encapsulated perfume, and from about 0.01% to about 5% by weight of the odor absorbing composition of a free perfume, and mixtures thereof; and a powder carrier. See Abstract. Preferably, the encapsulated perfume, whatever form it takes, is composed of perfume ingredients selected predominantly from two groups of ingredients, namely volatile perfume ingredients and ingredients having significant low odor detection threshold, and mixtures thereof. Typically, at least about 50%, preferably at least about 80% by weight of the encapsulated perfume is composed of perfume ingredients of these two groups. Suitable volatile perfume ingredients include cuminic aldehyde, octyl acetate, cis-jasmone, gamma-nonalactone, isobrynl acetate, methyl octyl acetaldehyde, etc., which are the same perfumes as recited by the instant claims. See column 5, line 5 to column

6, line 27. Additionally, there are also volatile ingredients that have a significantly low odor detection threshold which are useful including allyl amyl glycolate, etc. See column 7, lines 7-20.

Perring et al teach a perfume composition which gives good deposition and/or substantially improved deodorant effectiveness on textiles incorporating spandex fibres. The perfume comprises a mixture of fragrance materials in which at least 60% by weight of the composition comprises fragrance materials drawn from categories I and II. See Abstract. Suitable fragrance materials which fall under category II include cis-jasmone, etc. See column 6, lines 40-69. Suitable perfumes include dihydrolinalol, dihydromyrcenol, tetrahydrogeraniol, cis-jasmone, nonalactone gamma, etc., which are the same perfumes as recited by the instant claims. See column 5, line 45 to column 7, line 50.

Peterson et al, Perring et al, or '926 do not teach, with sufficient specificity, a perfume composition containing a mixture of at least 5 perfume ingredients such as in the specific amounts as recited by the instant claims.

It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to formulate a perfume composition containing a mixture of at least 5 perfume ingredients in the specific amounts as recited by the instant claims, with a reasonable expectation of success, because the broad teachings of Peterson et al, '926, or Perring et al suggest a perfume composition containing a mixture of at least 5 perfume ingredients in the specific amounts as recited by the instant claims.

Response to Arguments

With respect to the rejection of the instant claims under 35 USC 103 using Peterson et al, Applicant states that there is no suggestion in the reference to provide a composition containing at least 5 of the perfume components as recited by the instant claims. Further, Applicant states that Peterson et al teach a very long list of possible perfume ingredients and that the compositions as taught by Peterson et al function to reduce body odor by absorbing smell and not by preventing production of odiferous materials as achieved by the combination of perfume ingredients as recited by the instant claims. Also, Applicant states that the exemplified compositions of Peterson et al typically include one or two of the claimed perfume ingredients but the maximum amount of these is 15% and there is no teaching in Peterson et al of the significance of the claimed perfume ingredients. In response, note that, the Examiner asserts that while the exemplified compositions of Peterson et al may not have a mixture of at least 5 of the recited perfume ingredients, the teachings of a reference are not limited to the preferred embodiments; the broad teachings of Peterson et al clearly suggest perfume compositions containing the same perfumes in the same amounts as recited by the instant claims. Also, note that, while Applicant states that the mixture of perfumes as recited by the instant claims are particularly effective in reducing or preventing body malodor when applied to skin, no data or evidence has been presented to show the unexpected and superior odor reducing properties of the claimed mixture of perfumes in comparison to compositions falling outside the scope of the instant claims.

Further, while Applicant states that Peterson et al teach compositions that function to reduce body odor by absorbing smell and not by preventing production of

odiferous materials as achieved by the combination of perfume ingredients as recited by the instant claims, the Examiner asserts that the compositions as taught by Peterson et al would have the same odor preventing properties as recited by the instant claims because Peterson et al suggest compositions containing the same perfumes in the same amounts as recited by the instant claims. Note that, the reason or motivation to modify the reference may often suggest what the inventor has done, but for a different purpose or to solve a different problem. It is not necessary that the prior art suggest the combination to achieve the same advantage or result discovered by applicant. Note that, while there must be motivation to make the claimed invention, there is no requirement that the prior art provide the same reason as the applicant to make the claimed invention. In re Linter, 458 F.2d 1013, 173 USPQ 560 (CCPA 1972). See MPEP 2144.

With respect to Perring et al (US 6,780,835), Applicant states that because of the common ownership of the respective invention, Perring et al do not qualify as prior art against the instant claims under 35 USC 103, but in any case, the patent does not disclose a perfume composition as claimed including at least 5 of the specified perfume components. In response, note that, Applicant's statement of common ownership is not sufficient to disqualify Perring et al as prior art under 35 USC 103 because the statement is not in proper form. While Applicant states that there is common ownership between the instant application and Perring et al, the statement must be of a specific form such as "the subject matter of US ----- and the claimed invention were, at the time the invention was made, owned by ---- or subject to an obligation of assignment to the

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same person." Thus, Perring et al qualifies as prior art under 35 USC 102(e) for purposes of making a rejection under 35 USC 103 and has not been disqualified. Further, the Examiner asserts that a rejection of the instant claims under 35 USC 103 has been made using Perring et al as set forth above.

Conclusion

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Remaining references cited but not relied upon are considered to be cumulative to or less pertinent than those relied upon or discussed above.

Applicant is reminded that any evidence to be presented in accordance with 37 CFR 1.131 or 1.132 should be submitted before final rejection in order to be considered timely.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Gregory R. Del Cotto whose telephone number is (571) 272-1312. The examiner can normally be reached on Mon. thru Fri. from 8:30 AM to 6:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Harold Pyon can be reached on (571) 272-1498. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Gregory R. Del Cotto/
Primary Examiner, Art Unit 1796

/G. R. D./
June 22, 2008